COLD STORAGE (M) BHD.

v.

PEMUNGUT DUTI SETEM

HIGH COURT MALAYA, KUALA LUMPUR
HARUN HASHIM J
[ORIGINATING MOTION NO. A18 OF 1985]
30 DECEMBER 1986

REVENUE LAW: *Appeal against decision of Collector of Stamp Duties in assessing stamp duty on sale of shares under Item 32(b) of the 1st Schedule of Stamp Ordinance 1949 - Claim that sale part and parcel of a scheme for the reconstruction and amalgamation of companies in compliance with government policy - Therefore relief under s. 15(1) of the Stamp Ordinance ought to be given - Whether relief allowed - Whether proposed scheme in compliance with government policy.*

CIVIL PROCEDURE: *Appeals from Collector to High Court - Whether appellant's solicitor should make the first draft of the case before Collector is required to state and sign case pursuant to s. 39 of the Stamp Ordinance.*

In response to the New Economic Policy ("the NEP"), the appellant's holding company reduced its holding in the appellant company in 1980. The Foreign Investment Committee ("the FIC") gave its approval to the reduction on the condition that a further 5% of the appellant's share capital should be offered to Bumiputra interests within 2 years. The holding company restructured itself so that participation be concentrated in the appellant company. Through a series of transactions, all with the approval of the FIC and the Capital Issues Committee ("the CIC"), the reconstruction scheme was implemented which involved, *inter alia,* a sale of shares in the appellant company to a solely owned Bumiputra company known as Pradaz Sdn. Bhd. for a consideration of RM44.4 million cash. The appellant company applied for exemption from stamp duty in respect of the sale of shares to Pradaz. The Collector of Stamp Duties held that both companies (i.e., the holding company and the appellant company) had earlier reconstructed within the NEP goals and that the amalgamation would not directly result in any change in the existing ratio of equity ownership of the appellant company. The changes in equity ownership were effected by a separate contract arrangement and against consideration in cash. This scheme of amalgamation cannot therefore be considered to have been undertaken in compliance with government policy on capital participation in industry. The application for relief failed. The appellant company appealed to the High Court.

Held:

[1] Where the government's approval is obtained for reconstructing and amalgamating companies and that approval is given by the CIC with no objections from the FIC, such approval must be deemed to be in complaince with government policy.

[2] Reconstruction of companies takes several steps and many documents. Events commencing from 28 January 1984 until final sale of shares constitutes one scheme of reconstruction and relief is available any number of times it obtains approval from the CIC after reference to the FIC.

[3] The sale of the shares was for cash and accordingly s. 15(1)(c) of the Stamp Ordinance was not satisfied to entitle exemption from payment of duty.

[4] The correct procedure for appeals from the Collector to the High Court is as follows:

(a) Within 21 days of the date of the assessment and on payment of duty, file Notice of Appeal with the Collector.

(b) Appellant requires Collector to state and sign a case.

(c) Collector states and signs Case and delivers it to appellant.

(d) Within 7 days of receipt of the Case Stated, the appellant files Originating Motion in the High Court under RHC O. 55 r. 13.

[Appeal dismissed with costs.]

Case referred to:
Cheong Yok Choy & Anor. v. The Collector of Stamp Duties, Kuala Lumpur [1950] MLJ 276

Legislation referred to:
Finance Act 1983 (Act 239), s. 15(1)
Rules of the High Court 1980, O. 55 r. 13
Securities Industry Act 1983, s. 5
Stamp Ordinance 1949, ss. 15, 15(1), 15(1)(c), 36, 39

For the appellant - Chan Hua Eng; M/s. Shearn Delamore & Co.
For the collector - Ab. Hamid Mohamed, SFC

JUDGMENT

Harun J:

This is an appeal against the decision of the Collector of Stamp Duties in assessing stamp duty at RM201,960 on a sale of shares valued at RM67,320,000 under item 32(b) of the First Schedule of the Stamp Ordinance 1949. The appellant contends that it is entitled to **relief** from stamp duty under s. 15(1) on the grounds that the aforesaid sale was part and parcel of a scheme for the reconstruction and amalgamation of companies in compliance with Government policy on capital participation in industry.

Section 15 of the Stamp Ordinance is a very lengthy and detailed provision for granting relief from payment of stamp duty in case of reconstructions or amalgamations of companies and has been on the statute books since 1949 in the following terms:

> (1) If in connection with a scheme for the reconstruction of any company or companies or the amalgamation of any companies it is shown to the satisfaction of the Collector of Stamp Duties that there exist the following conditions, that is to say:

By Act 293, s. 15(1) was amended as follows:

> If in connection with a scheme for the reconstruction of any company or companies or the amalgamation of any companies it is shown to the satisfaction of the Collector of Stamp Duties that **the scheme is in compliance with Government policy on capital participation in industry and** there exist the following conditions, that is to say:

the underlined words being added to the long standing provision. In my judgment the effect of the amendment is that with effect from 1 January 1984 compliance with Government policy on capital participation in industry is a **condition precedent** to the grant of relief from stamp duty in case of reconstructions or amalgamation of companies. It follows that since 1984, reconstruction and amalgamations of companies which do not comply with Government policy

on capital participation in industry are no longer entitled to exemption from stamp duty as they had been prior to 1984. But it does not follow that merely because the scheme is in compliance with Government policy on capital participation in industry it is entitled to exemption from stamp duty because, with the use of the word "**and**" at the end of the amendment, all the other conditions of s. 15 must be complied with.

In the instant case, Cold Storage Holdings Plc is a company incorporated in England (the English company) and held 100% of the issued share capital of Cold Storage (Malaysia) Bhd. (the appellant) and 100% of the issued share capital of FIMA Supermarkets Malaysia Bhd. In 1980, in response to the New Economic Policy of the Government, it reduced its holdings in:

(a) Cold Storage Malaysia to 65%; and

(b) Fima Supermarkets to 70%.

In giving its approval to these reductions, the Foreign Investment Committee imposed a condition that a further 5% of the share capital of Cold Storage Malaysia should be offered to Bumiputra Interests within two years.

The English company decided that the most expedient method of introducing Malaysian participation was by restructuring its operations in such a manner that all participation whether by itself or by Malaysians, be concentrated in one company, viz., Cold Storage Malaysia. This meant the acquisition of the whole of the issued share capital of Fima Supermarkets by Cold Storage Malaysia from existing shareholders, viz., Kumpulan Fima Bhd. and the English company, the consideration wherefor was to be satisfied wholly by the issue of shares in Cold Storage Malaysia followed thereafter by the sale of shares in Cold Storage Malaysia by the English company and Kumpulan Fima of 29.3% of the enlarged issued share capital of Cold Storage Malaysia to Pradaz Sdn. Bhd. The effect of these proposals would be that the interests of the English company would be reduced form 65% to 42.1% with 10% being held by Kumpulan Fima resulting in more than 51% of Cold Storage Malaysia to be held by Bumiputras, thus according to the appellant, meeting the objectives of the New Economic Policy which are to restructure the capital sector in Malaysia so that by 1990 the equity distribution will be as follows:

Bumiputra	30%
Non-Bumiputra	40%
Foreigners	30%

The scheme of reconstruction was carried out in stages. By an agreement dated 28 January 1984, Kumpulan Fima Bhd. and the English company agreed to sell all their holdings in Fima Supermarkets to Cold Storage Malaysia subject to the approval of the Government and the shareholders of the companies.

The authorised capital Fima Supermarkets was RM30 million made up of 30 million shares of RM1 each of which 24 million shares had been issued and fully paid-up. Of these, the English company held 16,800,000 shares and Kumpulan Fima held 7,200,000 shares. Under the Agreement, the Fima Supermarkets shares were to be exchanged for 24 million shares of Cold Storage Malaysia on the basis of one new share in Cold Storage malaysia for an existing share in Fima Supermarkets.

On 24 February 1984, the Merchant Bankers on behalf of the English company, Cold Storage Malaysia and Fima Supermarkets applied to the Foreign Investment Committee of the Prime Minister's Department for approval of its proposed reconstruction scheme so that the equity of Cold Storage Malaysia will be:

The English company	-	42.5%
Pradaz Sdn. Bhd.	-	29.6%
Kumpulan Fima	-	10%
Other Shareholders	-	17.8%.

According to the Merchant Bankers, Pradaz is a new 100% Bumiputra company whose shareholders are En. Daim bin Zainuddin (50%), En. Ab. Rashid Manaff (25%) and En. Ghazali b. Mat Ariff (25%). It also sought approval for the English company and Kumpulan Fima to sell 25% of their shares and 4.6% of the enlarged capital of Cold Storage Malaysia to Pradaz for a total consideration of RM44.4 million cash.

On 30 April 1984, the Merchant Bankers, on behalf of the same parties applied to the Capital Issues Committee of Bank Negara Malaysia for approval to carry into effect the agreement of 28 January 1984 and the proposals as contained in its application to the Foreign Investment Committee of 24 February 1984.

On 20 July 1984, the Foreign Investment Committee said it had no objections to the proposed reconstruction scheme. On 18 September 1984, the Capital Issues Committee approved:

(a) The exchange of shares as follows:

Shares held by	**No. of Fima Supermarkets shares**	**No. of new Cold Storage Malaysia shares to beissued**
English company	16,800,000	15,400,000
Kumpulan Fima	7,200,000	6,600,000
	24,000,000	22,000,000

(b) Divestment Paradaz:

From English company	-	11,852,000
From Kumpulan Fima	-	1,900,000
		13,752,000

at RM3.06 per shares of Cold Storage Malaysia shares

(c) Listing and quotation of the new 22 million shares on the Kuala Lumpur Stock Exchange.

The reconstruction scheme was implemented. The appellant applied for exemption from stamp duty in respect of the sale of shares to Pradaz. The Collector of Stamp Duties on 9 May 1985 held:

> That both companies had earlier reconstructed within the New Economic Policy goals and that the amalgamation would not directly result in any change in the existing ratios of equity ownership of Cold Storage. The changes in equity ownership, it will be noted, was effected by a separate contract arrangement and against consideration in cash. This scheme of amalgamation cannot therefore be considered to have been undertaken "in compliance with Government policy on capital participation in industry ..." (amendment to s. 15(1) by Act 293 of 1983). I regret to state therefore that your application for reliefs cannot be recommended to the Collector for consideration. Accordingly I assess duty payable on the instruments of transfer at RM201,960 calculated on the value consideration for transfer being RM67,320,000.

The Government policy on capital participation in industry referred to in s. 15(1) is not defined in the Ordinance. Both the appellant and the Collector assume that policy to be New Economic Policy referred to earlier. In the nature of things, Government policy changes from Government to Government and sometimes by the same Government, depending on political, economic and social considerations at any given time. Whatever that phrase might mean, it would appear from the facts of this case that where Government's approval is obtained for reconstructing and amalgamating companies and that approval is given as in this instance by the Capital Issues Committee established under s. 5 of the Securities Industry Act 1983 with no objections from the Foreign Investment Committee of the Prime Minister's Department, then such approval must be deemed to be in compliance with Government policy on capital participation in industry within the meaning of s. 15(1).

As is evident from the facts of this case, reconstructing of companies cannot be accomplished in a single step or embodied in as single document. It takes several steps and many documents. I am satisfied that the events commencing from 28 January 1984 until the final sale of shares to Pradaz Sdn. Bhd. constitute one scheme of reconstruction. Even if that were so, it is urged that reconstruction to accord with the New Economic Policy had already been accomplished in 1980. Hence the argument of no real change in the existing ratios of equity ownership in the 1984 exercise. It may well be, following the events of 1980 that the English company immediately nurtured a scheme to increase Malaysian equity participation which came to fruition in 1984 and therefore the reconstructing scheme in fact commenced in 1980 and was completed in 1984. I think it will not be necessary to dissect and analyse the thoughts of the Directors in the Board Room. Section 15(1) does not say that a company is limited to only one reconstruction exercise or that once the minimum ratios of Bumiputra and Malaysian equity participation have been achieved, the company is entitled to further reliefs. As s. 15(1) stands, I hold that a company is not entitled to relief from stamp duty any number of times it obtains approval from the Capital Issues Committee after reference to the Foreign Investment Committee.

There is, however, another matter. Although the divestment of Cold Storage Malaysia shares to Pradaz Sdn. Bhd. was in compliance with Government policy on capital participation in industry under s. 15(1), it must also satisfy the condition under sub-section (1)(c) which reads:

> that the consideration for the acquisition (except such part thereof as consists in the transfer to or discharge by the transferee company of liabilities of the existing company) consists as to not less than ninety per centum thereof:
>
> (i) -
>
> (ii) where shares are to be acquired, in the issue of shares in the transferee company to the holders of shares in the existing company in exchange for the shares held by them in the existing company.

Here as far as the transfer of shares to Pradaz Sdn. Bhd. is concerned, there was no exchange of shares but a sale of shares for cash and accordingly the condition has not been satisfied to entitle exemption from payment of duty. For this reason I find that the Collector of Stamp Duty is correct in holding that stamp duty is chargeable in this instance.

Finally, some doubts were expressed as to the correct procedure in dealing with appeals from the Collector. Section 39 provides:

(1) Any person who is dissatisfied with the assessment of the Collector may, within twenty-one days after the date of the assessment and upon payment of duty in conformity therewith, appeal against the assessment to the High Court, and may for that purpose require the Collector to state and sign a case, setting forth the question upon which his opinion was required, and the assessment made by him.

(2) The Collector shall thereupon state and sign a case and deliver the same to the person by whom it is required, and the case may, within seven days thereafter or within such further time as the Court may allow, be set down by him for hearing.

(3) Upon the hearing of the case the Court shall determine the question submitted, and, if the instrument in question is in the opinion of the Court chargeable with any duty, shall assess the duty with which it is chargeable.

(4) If it is decided by the Court that the assessment of the Collector is erroneous, any excess of duty which may have been paid in conformity with the erroneous assessment, together with any fine or penalty which may have been paid in consequence thereof, shall be ordered by the Court to be repaid to the appellant, with or without costs as the Court may determine.

(5) If the assessment of the Collector is confirmed the Court may make an order for payment to the Collector of the Costs incurred by him in relation to the appeal.

Here, the appellant, being dissatisfied with the assessment, required the Collector to state and sign a case under sub-section (1). The Collector replied that following *Cheong Yok Choy & Anor. v. The Collector of Stamp Duties, Kuala Lumpur* [1950] MLJ 276 it is the appellant's solicitors who should make the first draft of the case. I am inclined to think that the procedure suggested in that case was relevant to the practice prevailing in 1950 and should not now be followed. There is no reason why the Collector cannot himself state and sign the case. The question was before him and it is his judgment under s. 36 that is being appealed against under s. 39.

The correct procedure for appeals from the Collector to the High Court is as follows:

(a) Within 21 days of the date of the assessment and on payment of duty, file Notice of Appeal with the Collector.

(b) Appellant requires Collector to state and sign a Case.

(c) Collector states and signs Case and delivers it to appellant.

(d) Within 7 days of receipt of the Case Stated, the appellant files Originating Motion in the High Court under RHC O. 55 r. 13.

For the reasons stated, the appeal is dismissed with costs.

Also found at [1987] 1 CLJ 261